United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

76-4114

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4114

B
P/S

CHUNG YING CHAU,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

ROBERT B. FISKE, JR.,
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THOMAS H. BELOTE,
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UNITED STATES COURT OF APPEALS
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Docket No. 76-4114

CHUNG YING CHAU,

Petitioner,

- against -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

STATEMENT OF THE ISSUE

WHETHER THE BOARD OF IMMIGRATION APPEALS ABUSED ITS DISCRETIONARY AUTHORITY BY DENYING THE ALIEN ADJUSTMENT OF STATUS AND PERMISSION TO REAPPLY FOR ADMISSION FOLLOWING ARREST AND DEPORTATION.

STATEMENT OF THE CASE

Pursuant to Section 106(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105(a), Chung Ying Chau petitions this Court for review of an order

entered by the Board of Immigration Appeals (the "Board") on February 25, 1976, denying his applications for adjustment of status and permission to reapply for admission after arrest and deportation, and granting him the privilege of voluntary departure. That order dismissed the petitioner's appeal, and affirmed the order and decision of the Immigration Judge of June 25, 1975, which found that petitioner failed to carry his burden to establish that the granting of discretionary relief under Section 212(a)(17) of the Act, 8 U.S.C. §1182(a)(17), and under Section 245, 8 U.S.C. §1255 was justified. The petitioner contends that the Board's order should be set aside because it was arbitrary and an abuse of discretion.

STATEMENT OF FACTS

The petitioner, a native and citizen of China, first entered the United States as a crewman on January 21, 1967, deserted his vessel and overstayed his 29 day maximum allotted time. A deportation

hearing was held on February 19, 1968 and petitioner was found deportable, was denied voluntary departure, and was ordered deported. After his motion to reopen was denied, he was subsequently deported on March 12, 1971.

On January 12, 1972, while residing in Hong Kong, petitioner applied for permission to reapply for admission into the United States following arrest and deportation. This application was denied on May 4, 1972. According to petitioner's affidavit dated September 10, 1974, he then went to a Hong Kong travel agency, which obtained a nonimmigrant visa for him for a fee of three hundred or four hundred dollars. He thereafter entered the United States on January 13, 1973, as a visitor for pleasure, and again remained longer than permitted. Deportation proceedings were initiated, and petitioner was again ordered deported. While here, he has received a Department of Labor certification as a specialty cook.

After deportation proceedings were commenced, petitioner applied once again for permission to reapply for admission pursuant to Section 212(a)(17) of the Act, and also renewed his application for a Section 245 adjustment of status for permanent residence and for the privilege of voluntary departure. In his decision of June 25, 1975, the Immigration Judge granted petitioner the privilege of voluntary departure, and denied his request for permission to reapply for admission because of petitioner's failure to present outstanding equities in his favor to counteract the adverse factors present in the case. The Immigration Judge similarly denied petitioner's application for adjustment of status due to the absence of unusual equities in his favor and also because of his ineligibility for that relief due to his inadmissibility to the United States.

Petitioner appealed that decision to the Board and on February 25, 1976, the Board affirmed the

decision of the Immigration Judge and dismissed the appeal. A warrant of deportation was issued on April 19, 1976, and petitioner then filed this petition for review, thereby gaining an automatic stay of deportation pursuant to Section 106(a)(3) of the Act, 8 U.S.C. §1105(a)(3).

RELEVANT STATUTES

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

> Section 245, 8 U.S.C. §1255
>
> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

Section 212(a)(17), 8 U.S.C. §1182(a)(17)

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this chapter or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 1252(b) of this title, unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission;

THE BOARD OF IMMIGRATION APPEALS DID NOT ABUSE ITS DISCRETIONARY AUTHORITY BY DENYING THE ALIEN ADJUSTMENT OF STATUS AND PERMISSION TO REAPPLY FOR ADMISSION FOLLOWING ARREST AND DEPORTATION

A. The grant or denial of adjustment of status is a matter of discretion.

Section 245 of the Act, 8 U.S.C. §1255, provides that the Attorney General, in his discretion,

may adjust the status of an alien to that of a permanent resident provided that the alien is eligible to receive an immigrant visa, is admissible to the United States, and provided an immigrant visa is immediately available to him. "Because this form of relief circumvents ordinary immigration procedures, it is extraordinary and will only be granted in meritorious cases, and the burden is on the immigrant to prove that his case is meritorious." Chen v. Foley, 385 F.2d 929, 934 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968); Ameeriar v. Immigration and Naturalization Service, 438 F.2d 1028 (3d Cir. 1971), cert. denied, 404 U.S. 801 (1972); Santos v. Immigration and Naturalization Service, 375 F.2d 262 (9th Cir. 1967).

In order for an alien to be eligible for consideration, he must first satisfy the substantive prerequisites contained in the statute. Having done so, he must then persuade the Attorney General to exercise his discretion favorably. Like all discretion-

ary administrative remedies, adjustment of status pursuant to Section 245 is a matter of grace; mere eligibility does not establish a right to the discretionary relief requested and "discretion must be exercised even though statutory prerequisites have been met." Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957); Ameeriar v. Immigration and Naturalization Service, supra; Santos v. Immigration and Naturalization Service, supra; Jarecha v. Immigration and Naturalization Service, 417 F.2d 220 (5th Cir. 1969). Thus, the extent of judicial review of a denial of discretionary relief is severly limited; the court is bound by the record and may not substitute its judgment for that of the administrative agency. Astudillo v. Immigration and Naturalization Service, 443 F.2d 525 (9th Cir. 1971); Jarecha v. Immigration and Naturalization Service, supra; Chen v. Foley, supra; Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963), cert. denied, 376 U.S. 933 (1964). The discretionary decision to deny an alien adjustment of

status will be overturned only upon a showing that such discretion has been abused, Soo Yuen v. Immigration and Naturalization Service, 456 F.2d 1107 (9th Cir. 1972), and in the Second Circuit, abuse of discretion is established only upon a showing that the decision was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race or group..." Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715, 719 (2d Cir. 1966); Ling Shing v. Esperdy, 305 F. Supp. 1106 (S.D.N.Y. 1969); Wan Ching Shek v. Esperdy, 304 F. Supp. 1086 (S.D.N.Y. 1969).

B. The denial of adjustment of status was a proper exercise of discretion.

Petitioner initially fails to satisfy the statutory requirements for this relief. Section 245 provides that before the Attorney General may favorably exercise his discretion and grant adjustment of status, the alien must be eligible to receive an immigrant visa and must be admissible to the United States. But

petitioner, as an alien who has previously been arrested and deported, is ineligible to receive a visa and inadmissible to the United States.* Section 212(a)(17) of the Act, 8 U.S.C. §1182(a)(17).

Assuming arguendo, that the Attorney General were now to grant petitioner permission to reapply for admission, nunc pro tunc, a reversal by this Court of the Board's decision would still be unwarranted. Clearly petitioner failed to carry his burden of proof that the Board's denial of his application for adjustment of status was an abuse of discretion. The basis of the Immigration Judge's decision to exercise his discretion unfavorably to petitioner, affirmed by the Board, was the absence of unusual or outstanding equities in petitioner's favor to counteract the many adverse factors present in his case, according to the standard enunciated in Matter of Arai, 13 I & N Dec. 494 (BIA 1970). Among the adverse factors noted by the Immigration Judge are petitioner's

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*Since he has not obtained the consent of the Attorney General to reapply for admission.

repeated refusals to depart from the United States within the allotted time and the consequent necessitating of two deportation proceedings; petitioner's reentry into the United States despite his failure to first obtain the permission of the Attorney General to reapply for admission; his apparent knowledge that permission to reapply was necessary, by virtue of the fact that he had previously applied for permission to reapply while still in Hong Kong, which permission had been denied (Record at 55-57), and had received, by certified mail, a notice of penalty for reentry without permission (Record at 82); and petitioner's former submission of erroneous income tax data and subsequent failure to correct it when given the opportunity to do so, as found by an Immigration Judge in his uncontested and final decision denying petitioner the privilege of voluntary departure in his original deportation proceedings (Record at p. 75-77). That such factors are sufficient to sustain the discretionary denial of relief is obvious. Moreover, the Immigration Judge

noted the absence of outstanding equities in this case, such as close family ties, since petitioner's wife and two children are in China. The circumstance of lack of family ties in the United States has been held, in itself, to be a sufficient reason to deny the discretionary relief of adjustment of status. Soo Yuen v. Immigration and Naturalization Service, supra; Santos v. Immigration and Naturalization Service, supra. See also Jarecha v. Immigration and Naturalization Service, supra.

C. The grant or denial of permission to reapply for admission into the United States is a matter of discretion.

Section 212(a)(17) of the Act, 8 U.S.C. §1182(a)(17) provides that aliens who have been arrested and deported are excluded from admission into the United States unless they have obtained the permission of the Attorney General to reapply for admission. The grant or denial of this permission is discretionary, and, just like the discretionary remedy of adjustment of

status, will be overturned only upon a showing of abuse of administrative discretion. de Vargas v. Immigration and Naturalization Service, 409 F.2d 335 (5th Cir. 1968), cert. denied, 396 U.S. 895 (1969); Murillo-Aguilera v. Rosenberg, 351 F.2d 289 (9th Cir. 1965); Gonzalez-Jiminez v. Del Guercio, 253 F.2d 420 (9th Cir. 1958); Matter of Chim, Int. Dec. 2203 (Reg. Comm. 1973).

D. The denial of permission to reapply for admission was a proper exercise of discretion.

In denying petitioner's request for permission to reapply, the Immigration Judge noted that the same adverse factors enumerated with respect to the denial of adjustment of status similarly outweighed any unusual equities in petitioner's favor with respect to his request for the discretionary relief of permission to reapply. Just as these factors are sufficient to justify the denial of one form of discretionary relief, they will clearly be sufficient to justify the denial of another discretionary remedy. Even under the standard utilized in an early Board decision cited by

petitioner, Matter of H-R-, 5 I & N Dec. 769 (BIA 1954), petitioner has still failed to carry his burden of proof that the decisions of the Immigration Judge and the Board of Immigration Appeals were arbitrary and an abuse of discretion.

In Matter of H-R-, the Board described the standard applied by the Service to requests for permission to reapply for admission after arrest and deportation as denial of permission "in all cases unless it appears that (1) unusual hardship would result to persons lawfully in the United States if the application should be denied, or (2) there is need for the services of the applicant in the United States, or (3) the applicant is a bona fide crewman... or (4) it is necessary for the applicant to enter the United States frequently across the international land border to purchase the necessities of life..." Id. at 770-71. The Board also mentioned two other factors to be considered additionally: the alien's inadmissibility into the United States, and whether the alien's fraud in entering without the

requisite permission is a bar to his readmission. Since petitioner does not even fall into one of the first four categories, it is unnecessary to discuss the latter two.

Quite clearly, petitioner does not fall within the confines of categories three or four; nor does he claim to. Petitioner's major argument appears to be that he fits within categories one and two because he has been granted an employment certification as a Chinese specialty cook; he argues that this certification is evidence that unusual hardship would result: to his employer should his request for permission be denied, and that "there is need for the services of the applicant in the United States", as described by categories one and two of the Board's decision in Matter of H-R-. These contentions are erroneous both in law and logic. As discussed in a more recent administrative decision of a case presenting somewhat similar facts, Matter of Chim, Int. Dec. 2203 (Reg. Comm. 1973), "The mere approval of the sixth preference visa does not establish a need. It merely establishes that he

has a job offer and that the Labor Department has determined that there is a shortage of Chinese cooks here." Id. at 4. The basic thrust of such a certification is that the alien's employment here in such a capacity will displace no American workers, with a view toward protection of the American labor market. Thus, petitioner has established no need for his services by merely presenting the Board with his approved labor certification. Moreover, even if a genuine need were found to exist, that one factor would not override the discretionary denial of permission, since petitioner still would not be entitled to a favorable exercise of discretion due to his past violations of the immigration laws. Id. See also Reyes-Cerna v. Immigration and Naturalization Service, 345 F. Supp. 1348 (N.D. Ill. 1972).

Furthermore, since petitioner has established no need for his services here, he has similarly established no hardship to his employer if his application were to be denied. In any event, it is doubtful

whether this is the sort of hardship contemplated by the Board in its list of unusual cases that would serve to counteract the ordinary denial of permission. Denial of permission to reapply has been affirmed as not manifesting an abuse of discretion, when the alien had obtained an immigration visa without prior consent to reapply, or when the alien made several illegal entries or overstayed and subsequently sought permission to reapply, nunc pro tunc, even in the presence of hardship to the alien's family. In de Vargas v. Immigration and Naturalization Service, supra, the denial of permission was affirmed despite the fact that the petitioner was the mother of two United States citizen children residing here. See also Gonzalez-Jiminez v. Del Guercio, supra (denial affirmed despite hardship resulting from the fact the petitioner's wife was granted such relief). Since petitioner's wife and two children are residing in Hong Kong, he can hardly claim hardship as a result of family ties, and as previously discussed, he can obviously not claim hardship as a result of the fact that his

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employer will be denied his services as a cook. In addition, the fact that petitioner knew of the necessity to make an application for permission to reapply can be taken into consideration and can override the presence of hardship. Id. C.F. Favela v. Immigration and Naturalization Service, 420 F.2d 575 (9th Cir. 1969), cert. denied, 398 U.S. 910 (1970 (petitioner held deportable even though he claimed lack of knowledge that permission to reapply was necessary). Thus, by any standard, petitioner has failed to establish an abuse of discretion in the Board's denial of this discretionary relief.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-4114

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2nd day of August, 1976 she served two copys of the within Govt's Brief

by placing the same in a properly postpaid franked envelope addressed:

Barst & Mukamal, Esquires
127 John Street
New York, New York 10038

says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

And deponent further

Sworn to before me this

Marian J. Bryant

2nd day of August, 1976

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977